United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2241

UNITED STATES COURT OF APPEALS
For the Second Circuit

MARY JAMES, et al.,

Plaintiffs-Appellees,

-against-

AARON BARNETT, et al.,

Defendants-Appellants,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendant.

On Appeal from the United States District Court for the Eastern District of New York.

BRIEF FOR PLAINTIFFS-APPELLEES

LAWRENCE G. SAGER
ARTHUR EISENBERG
RICHARD BELLMAN
Attorneys for Plaintiffs-Appellees
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARY JAMES, SAMMIE DORIS WILLOUGHBY, LUCIA SCIPP, on behalf of each and on behalf of all others similarly situated, and the WYANDANCH COMMUNITY DEVELOPMENT CORPORATION,

Plaintiffs-Appellees,

-against- : 74-2241

AARON BARNETT, Supervisor of the Town of Babylon; VINCENT MANNA, Councilman for the Town of Babylon; ROWLAND SCOTT, Councilman for the Town of Babylon; SONDRA BACHETY, Councilwoman for the Town of Babylon; PATRICK WATERS, Councilman for the Town of Babylon; RAY ALLMENDINGER, Councilman for the Town of Babylon; HAROLD WITHERS, Councilman for the Town of Babylon; TOWN OF BABYLON,

Defendants-Appellants,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendant.

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On Appeal from the United States District Court
for the Eastern District of New York.

Brief for Plaintiffs-Appellees

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SUPPLEMENTAL STATEMENT OF ISSUES ON APPEAL

In addition to the issues on appeal set forth at pp. 1-2 of the "Brief for Defendants-Appellants" there is the initial threshold issue of whether this court is without jurisdiction to entertain the instant appeal.

STATEMENT OF THE CASE

A. Statement of Facts

This action concerns the proposed construction of 182 housing units for low and moderate income families in the unincorporated hamlet of Wyandanch which is located within the Town of Babylon, New York. The proposed housing development was to have been a joint project of the New York State Urban Development Corporation, the Suffolk County Development Corporation and the Wyandanch Community Development Corporation. Pursuant to a recently enacted amendment to the New York State Urban Development Act (Chapter 446, 1973 Laws of the State of New York) Town and Village governments are empowered to veto Urban Development Corporation proposals for the construction of housing units within their borders.[1/] On August 16, 1973, the Town Board of Babylon exercised this veto over the proposed Wyandanch housing units. In this action, Plaintiffs contend:

> A. that the veto of the Wyandanch Housing proposal by the Town Board of Babylon was racially discriminatory in purpose and effect, was unsupported by any legitimate governmental interest, and denied Plaintiffs and members of their class rights secured to them by the Fourteenth Amendment to the United States Constitution and various federal statutes intended to secure their civil rights;
>
> B. that Chapter 446, 1973 Laws of New York State, insofar as it gives Towns and Villages the right to arbitrarily veto proposed projects of the New York State Urban Development Corporation violates the same

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1/ This veto power is not conferred upon City governments under the New York State Urban Development Act.

constitutional and statutory provisions in its purpose, effect and operation; and

C. that both the veto of the Wyandanch Housing proposal and the enactment of Chapter 446, 1973 Laws of New York State discriminate against persons of low income by denying them rights secured by the Fourteenth Amendment and the various federal statutes intended to secure their civil rights.

Accordingly, plaintiffs seek declaratory and appropriate equitable relief against the operation of the August 16, 1973 veto by the Town Board of Babylon, to the end of securing the construction of the proposed housing. Plaintiffs also seek declaratory relief regarding the operation of Chapter 446, 1973 Laws of New York State. (6a-7a) 2/

Plaintiffs in this action include the Wyandanch Community Development Corporation, and three individuals, Mary James, Sammie Doris Willoughby and Lucia Scipp. The individual plaintiffs are black American citizens of low, or, at best, moderate incomes, who presently reside in Wyandanch, New York, who would qualify as tenants in the proposed Wyandanch housing development and who desire to live in such a housing complex. One of the plaintiffs, Mary James, is also an elderly person who because of her age would independently qualify as a tenant in the proposed Wyandanch housing development. (8a-10a)

Since the three named plaintiffs represent hundreds of persons similarly situated, and since the plaintiffs request broad declaratory and equitable relief, they sought to have this action certified as a class action under Fed. R. Civ. P. 23(a)

2/ Parenthetical references, such as that above and throughout the Statement of the Case, are to the pagination within the Joint Appendix which was filed with the brief for Defendants-Appellants.

and (b)(2).

Consequently, on or about June 21, 1974 the individual plaintiffs moved before the district court for an order determining that this action is maintainable as a class action; and, if maintainable as a class action, for a determination of the membership of the class (73a-74-a).[3/] The definition of the class as suggested in the complaint (10a) was to include "elderly persons as well as persons of low and moderate income who are desperately in need of adequate and decent housing at reasonable rentals who are or would be eligible for residence in the proposed Wyandanch housing development". In their memorandum of law in support of the class action motion and at oral argument in the district court, plaintiffs suggested that the parameters of the class might be limited to "black persons of low and moderate income who are eligible for the Wyandanch housing complex and who would want to live there if it were built".

In a Memorandum of Decision and Order, dated August 15, 1974, the Hon. Jacob Mishler, United States District Judge, concluded that "[t]he [instant] action is maintainable as a class action. The court [found] that the plaintiffs meet the requirements of Rule 23(a) and that the claims alleged in the complaint

3/ It should be noted that among the plaintiffs named in the above-styled action only the individual plaintiffs seek to bring this suit as a plaintiff class action. The corporate plaintiff does not purport to represent a class. It should also be noted that only the corporate plaintiff, the Wyandanch Community Development Corporation, seeks monetary damages in this lawsuit. The individual plaintiffs, James. Willoughby and Scipp, sueing on behalf of themselves and all others similarly situated, seek injunctive and declaratory relief but not monetary damages.

fall within the scope of Rule 23(b)(2)" (85a) Judge Mishler defined the class as "black residents of Wyandanch who are or who would be eligible for the low and moderate income units in the proposed Wyandanch housing as defined in the applicable state or federal statutes or regulations". (85a-86a)

B. Procedural Posture of the Case

A notice of appeal from the class action determination of Judge Mishler was filed in the United States Court for the Eastern District of New York on September 12, 1974. A Civil Appeal Pre-Argument Statement was filed on September 20, 1974.

This appeal is being undertaken, pursuant to 28 U.S.C. 1291. Accordingly, shortly after the filing of appellants brief, when it became apparent that appellant was not appealing from a final order within the meaning of 28 U.S.C. 1291, or within the meaning of the interpretative case law, appellees moved to dismiss the instant appeal for want of jurisdiction.[4/] In an order, dated December 17, 1974, the motion to dismiss the appeal was

4/ In opposing appellees motion to dismiss appellees were critical of appellants for having delayed making the motion until after appellants served and filed their appellate brief and joint appendix. It is appellees position, however, that under the Supreme Court's articulation of the "collateral order" doctrine in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), and the application of such a doctrine in cases such as Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (1974) such a delay is probably unavoidable. As discussed infra Argument, Point I, in determining whether a case is appealable under 28 U.S.C. 1291, this Court is required to examine whether the arguments and issues raised by the appellants on appeal take the Court into the heart of the merits of the case or whether the basis for the appeal is collateral to and separable from the merits. Accordingly, insofar as it is appellees' position that the "collateral order" test is one element of the inquiry by this Court into the appealability of the instant appeal, the best way and perhaps the only way to

"referred to the panel that will hear the appeal."[5/]

(continued)
truly determine whether the arguments on appeal are collateral to the merits is to examine the appellants' brief. Consequently, the failure to move to dismiss the instant appeal prior to the filing of appellants' brief was necessitated by the requirements of the Cohen v. Beneficial Loan Corp., supra, type of inquiry.

5/ Appellees motion to dismiss having been submitted to this panel, in an effort to assist the court, appellees will include in the single document denominated as "Brief for Plaintiffs-Appellees", the argument in support of the motion to dismiss as well as the substantive arguments regarding the merits of this appeal.

ARGUMENT

I. THE ORDER OF THE COURT BELOW DETERMINING THAT THIS CASE SHOULD PROCEED AS A CLASS ACTION CANNOT BE VIEWED AS A FINAL ORDER WITHIN THE MEANING OF 28 USC 1291. THE INSTANT APPEAL, THEREFORE, MUST BE DISMISSED FOR WANT OF JURISDICTION.

Appellant has undertaken the instant appeal pursuant to 28 U.S.C. 1291. However, this provision confers appellate jurisdiction upon United States Courts of Appeals only where the appeal is being taken from a final order of the district court.[6/] Accordingly, in moving to dismiss this appeal, it is plaintiffs' contention that the order of Judge Mishler in the court below, determining that this matter should proceed as a class action cannot be viewed as a final order within the meaning of 28 U.S.C. 1291; and that, therefore, this court does not possess jurisdiction to entertain this appeal.

For many years it had been the general rule in this Circuit as well as others, that orders allowing suits to proceed as class actions are not appealable under 28 U.S.C. 1291. See 3B Moore's Federal Practice (2nd ed., 1948, 1974) ¶23.97;

6/ 28 U.S.C. 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

7A Wright & Miller, Federal Practice and Procedure: Civil (1972) Sec. 1802; See also Walsh v. City of Detroit 412 F. 2d 226 (6th Cir., 1966); Thill Securities Corp. v. New York Stock Exchange 469 F. 2d 14 (7th Cir., 1972); Hacket v. General Host. Corp. 455 F. 2d 618 (3rd Cir., 1972).

Only within the last two years has this Court deviated somewhat from the general rule regarding "finality" and has under extraordinarily limited and unusual circumstances entertained appeals from district court orders granting class action status. See Herbst v. International Telephone & Telegraph 495 F. 2d 1308 (2nd Cir., 1974). See also Eisen v. Carlisle & Jacquelin (Eisen III) 479 F. 2d 1005 (2nd Cir., 1973).[7/] The recent decision by the United States Supreme Court approving this Court's assumption of jurisdiction in Eisen III (See Eisen v. Carlisle & Jacquelin, __U.S. ____, 40 L Ed. 2d 732, 744 (1974))

7/ In Eisen III, however, this Court asserted two independent bases for appellate jurisdiction. This court asserted jurisdiction on the theory that in Eisen II, 391 F. 2nd 555 (2nd Cir., 1968), it had expressly retained jurisdiction pending further development of a factual record on remand and that consequently no new jurisdictional basis was required for the decision in Eisen III. This Court also buttressed its continuing jurisdiction claim with the assertion that the order it was reviewing was a "final" order within the meaning of 28 U.S.C. 1291 and that therefore an appeal as of right was jurisdictionally possible.

in no way widens the very narrow circumstances which permit such extraordinary review.[8]

In Kohn v. Royall, Koegel & Wells, 496 F. 2d 1094 (2nd Cir. 1974), this Court reviewed thelimited circumstances under which a district court order granting class action status would be regarded as appealable under 28 U.S.C. 1291. Three doctrinal formulae were identified as having served as the bases for the determination of appealability of such orders. The first was the "death-knell doctrine", as articulated by this Court in Eisen v. Carlisle & Jacquelin (Eisen I), 370 F. 2d 119 (2nd Cir. 1966). The second was the "collateral order doctrine" deriving from the Supreme Court's decision in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). The third was the tripartite test, applied by this Court in Eisen v. Carlisle & Jacquelin (Eisen III), 479 F. 2d 1005 (2nd Cir. 1973), which encompasses and expands upon both of the prior formulations pertaining to appealability. In Kohn, this Court reaffirmed the tripartite

8/ The appellants herein argue to the contrary, asserting that the Supreme Court's decision in Eisen III constitutes an endorsement of the blanket appealability of class action designations. This argument was raised by the appellants in General Motors Corp. v. City of New York, 501 F.2d 639 (2nd Cir. 1974), and was conclusively rejected by this Court. This Court's rejection of such a claim was plainly correct; throughout the relevant portions of his opinion in Eisen III, Justice Powell carefully limits his conclusions concerning appealability to the very special circumstances of the case, circumstances which are in entire harmony with the tri-partite test which is the uncontested law of this Circuit. See General Motors Corp. v. City of New York, supra, 501 F.2d at 646-48.

test of Eisen III as the equation under which issues of appealability are to be decided.

More recently still, General Motors Corporation v. City of New York, 501 F. 2d 639 (2nd Cir. 1974), provided yet another occasion for this Court's consideration of the appealability of orders designating class actions. Once again this Court characterized those circumstances under which an appeal would lie as "exceptional" and once again this Court restated the tripartite test of Kohn and Eisen III. 501 F.2d at 644.

The legal standard against which the issue of appealability is to be measured is thus absolutely clear. An examination of this case in light of the tripartite standard of the General Motors Corp. case, Kohn, and Eisen III, makes it quite plain that Judge Mishler's order granting class action status to the instant cause is not appealable.

The three elements of inquiry implicit within the General Motors - Kohn - Eisen III line of cases is as follows:

> " (i) whether the class action determination is 'fundamental to the further conduct of the case;'
>
> (ii) whether review of that order is 'separable from the merits;'
>
> (iii) whether that order will cause 'irreparable harm to a defendant in terms of time and money spent in defending a huge class action ...'" See Kohn v. Royall, Koegel & Wells, supra at 1098.

In General Motors and in Kohn, application of this test led to the traditional conclusion that the order granting class action status was not appealable. In the instant case, the same result is dictated by the analysis in General Motors and Kohn.

(i) whether the class action determination is "fundamental to the further conduct of the case;"

As interpreted by this Court, the inquiry into the class action determination as being fundamental to the further conduct of the case appears to be a broadened statement of the death-knell doctrine. An order is "fundamental to the further conduct of the case" only where the "viability [of the action] turns on the class action determination". See Kohn v. Royall, Koegel & Wells, supra at 1099. Applying this standard to the facts of the instant case it is patently evident that the viability of the lawsuit does not turn on the class action determination. Unlike such stockholders' derivative suits as Eisen, supra and Herbst, supra, this case will vigorously continue whether or not it is permitted to proceed as a class action. Under both General Motors and Kohn, this observation conclusively negates the claim that the class action determination here is fundamental to the further conduct of the case. And, as this Court stated in Kohn,

"[a]ppellants' failure to demonstrate the 'fundamental' nature of this class action determination... virtually requires dismissal of the appeal." Kohn v. Royall, Koegel & Wells, supra at 1100.

(ii) whether review of the class action order is collateral to and separable from the merits;

This second element of the tripartite test derives from the collateral order doctrine articulated by the Supreme Court in Cohen v. Beneficial Loan Corp., supra. There the Court held a district court order appealable where it concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment. The Court in Cohen, supra at 546, summarized the collateral order doctrine, in this way:

> "This decision appears to fall in that small class which finally determines claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The instant case is far outside the small class of appealable decisions contemplated in Cohen. It is apparent that review of Judge Mishler's order would necessarily take this Court directly into the merits of the plaintiffs' claims. In opposing a class action determination in the court below, defendant's primary contention was that plaintiffs will not adequately represent the class, as required by Fed. R. Civ. P. 23

(a)(4) because they do not "represent the interests of those truly affected by the veto."[9] Thus, just as in Kohn v. Royall, Koegel & Wells, supra, the appellant here challenges the class action determination by questioning plaintiffs' standing to sue; and as this Court concluded in the Kohn case, supra at 1100, an inquiry into plaintiffs' standing to challenge the discriminatory behaviour of defendant, "is inextricably intertwined with the ultimate merits of [plaintiffs'] claim for relief." Consequently, in the case at bar, as in Kohn, review of the class action determination is not collateral to or separable from the underlying merits of the case.

(iii) whether the class action order will cause "irreparable harm to defendant in terms of time and money spent in defending a huge class action..."

In analyzing this last component of the tripartite test, "attention... must be directed to the incremental cost and time in defending the particular action if it is maintained as a class action". Kohn v. Royall, Koegel & Wells, supra at 1100. But as noted earlier, this action will go forward whether or not this suit is permitted to proceed as a class action. And the routine litigation costs implicit in pre-trial discovery and trial preparation will be no different whether or not this case

9/ This is appellants' primary argument in this Court as well. See Point II of Brief for Defendant-Appellants.

is maintained as a class action. Moreover, unlike cases such as Eisen and Herbst, where class action determinations were accomplished pursuant to F. R. Civ. P. 23(b)(3) and where, consequently, substantial cost to the parties and the courts would arise from compliance with the involved notice requirements of Rule 23(b)(3), the present suit is brought as a class action under Rule 23(b)(2). Consequently, the notice requirements imposed are not substantial and they would not pose any incremental cost to the defendants with regard to either time or money. Accordingly, again as in Kohn v. Royall, Koegel & Wells, supra, it is readily apparent that the case at bar does not present "one of those exceptional instances which compels disregard of the sound policy of finality".

In Kohn, supra, 496 F. 2d at 1101, this Court recalled the observation by Mr. Justice Frankfurter that the final judgment rule "was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all" Cobbledick v. United States, 309 U.S. 323, 324 (1940). The appellants in the instant case bear the burden of demonstrating that this is "one of those exceptional instances which compels disregard of the sound policy of finality". Kohn, supra, at 1101. Appellees submit that the instant appeal therefore should be dismissed on the grounds that the order below certifying the class action is not appealable.

II. THE CLASS ACTION DETERMINATION BELOW FULLY SATISFIES THE REQUIREMENTS OF RULE 23.

A. The general requirements of Rule 23(a) for maintenance of a class action are met.

In order to sue as representatives of a class, plaintiffs must satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure, which provides:

> "One or more members of a class may sue or be sued as representatives parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Plaintiffs-Appellees fully meet all of these requirements.

1. The Members of the Class are too Numerous to make Joinder Practicable.

Plaintiffs James, Willoughby and Scipp represent all black persons of low and moderate income who are presently living in inadequate housing, who would qualify as tenants in the proposed Wyandanch housing development.[10/] The precise number of

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10/ Appellants claim that plaintiffs cannot represent persons of moderate income becuase "none of the designated representatives falls under the category of 'moderate income'." It is clear that the plaintiffs are at the lower economic spectrum but the precise line between "low income" and "moderate income" may be so variable and difficult to define that for the purposes of the class action it is best to describe plaintiffs economic status as that of persons "of low or at best moderate incomes." And indeed the interests of persons who wish to live in the proposed Wyandanch housing development is precisely the same whether or not such persons are of low or moderate income. Accordingly, it is entirely appropriate for the individual plaintiffs to represent "black residents of Wyandanch who are or who would be eligible for the low and moderate income units in the proposed Wyandanch housing development..."

class members is presently impossible to determine. However, inasmuch as the proposed housing complex was to include 182 housing units ranging in size from efficiency accommodations to five bedroom apartments it is clear that the class of persons represented by the plaintiffs at bar would greatly exceed several hundred.

It is the general objective of Rule 23(a)(1) to prevent members of small classes from being unnecessarily deprived of their rights without a day in court. Matthies v. Seymour Mfg. Co., 270 F.2d 365 (2d Cir. 1959), cert. denied, 361 U.S. 962. The minimum membership of a class that is too numerous to make joinder practicable has, however, never been defined.

In Cypress v. Newport News General and Nonsectarian Hospital Ass'n., 375 F.2d 648, 653 (4th Cir. 1967), the court remarked that no "specified number is needed to maintain a class action, . . . application of the rule is to be considered in light of the particular circumstances of the case." The court went on to hold that a class of eighteen members was sufficient in a suit alleging racial discrimination by a hospital. See also: United States ex rel. Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y., 1971), (class action allowed on behalf of 38 inmates alleging confinement under different conditions from those applicable in the rest of the prison); Broussard v. Schlumberger Well Services, 315 F. Supp. 506 (S.D. Tex., 1970), (class action allowed in suit alleging racial discrimination brought on behalf of 56 black employees).

As in the above recited cases, the instant action involv-

ing a class in excess of several hundred certainly presents a situation where the members of the class are too numerous to make joinder practicable.

2. There are Questions of Law or Fact Common to the Class.

Plaintiffs alleged questions of both law and fact that are common to the class. Plaintiffs challenge the veto of the Wyandanch Housing proposal by the Babylon Town Board. And they additionally challenge the statutory provision, Chapter 446 of the 1973 Laws of New York State, pursuant to which the veto of the Wyandanch housing complex was accomplished. The legal theories regarding the discriminatory motive and impact of the decision to veto the housing complex are applicable to all black and poor persons who were denied the benefit of the Wyandanch housing complex as a result of the veto by the Babylon Town Board which was undertaken pursuant to Chapter 446 of the 1973 Laws of New York. Thus the legal claims supporting the requested equitable and declaratory relief are applicable to the entire class upon whose behalf this suit is brought. Similarly the factual transactions and occurrences which underly the legal claims are also applicable to all black persons who were denied the benefit of the Wyandanch housing complex. Again, as these persons constitute the class upon whose behalf this suit is brought, the legally relevant questions of fact are common to the entire class.

The slightly differing circumstances that might attend each person's eligibility for the proposed Wyandanch housing

complex does not alter class action status, because, as noted above, with regard to the critical factual matters pertaining to the veto of the Housing complex, the questions of fact are common to the entire class. In suits alleging racial discrimination the courts have regularly granted class action status, even though each member of the class was in slightly differing circumstances, aside from the question of discrimination. In Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2nd Cir., 1968), this Court found a class to exist in a case alleging discrimination against blacks and Hispanics in an urban renewal program, despite the fact that the particular circumstances surrounding each person's situation were different and some members of the class were satisfied by the actions of the defendant.

3. The Claims of the Representative Parties are Typical of the Claims of the Class.

The requirement for typical claims under Rule 23(a)(3) of the Federal Rules of Civil Procedure is often discussed in conjunction with the requirement of common questions of law or fact, Fed. R. Civ. P. 23(a)(2).

In Mack v. General Electric Co., 329 F. Supp. 72 (E.D. Pa., 1971)(discriminatory employment practices), the court blurred the distinction between the two requirements.

> "Since a permeating policy of racial discrimination is alleged, there can be little doubt that there are questions of law and fact common to all class members and that the claim of the Negro plaintiffs that they have been discriminated against will be typical of the claims of other Negroes. If the defendant does discriminate on racial grounds, it would seem that every Negro will be affected simi-

larly." Id. at 76.

It is clear that the instant plaintiffs are members of the class of black person of low and moderate incomes who were denied the opportunity to live in the Wyandanch housing project by the actions of defendants, and that their claim of discrimination is typical of the claims of the class. Accordingly, the requirement of Rule 23(a)(3) that the claims of the representative parties be typical of the claims of the class is satisfied.

4. The Representative Parties Will Fairly and Adequately Protect the Interests of the Class.

The adequacy of the representation provided by the named plaintiffs and their counsel is a factual question. The key element is a determination of whether the plaintiffs are in a good position to present a strong case on behalf of a group to which they presently belong. See Mack v. General Electric Co., supra. Here, the class action plaintiffs are all black persons who were denied the opportunity for decent housing in the proposed Wyandanch housing complex as a result of the actions of defendants.

Several factors are outlined in the cases discussing the requirement under Fed. R. Civ. P. 23(a)(4), which, in essence, elaborate the need for a vigorous prosecution of the action. See Eisen v. Carlisle & Jackquelin, 391 F.2d 555 (2nd Cir., 1968); and Mersay v First Republic Corp. of America, 43 F.R.D. 465 (S.D.N.Y. 1968). These factors include: (a) a requirement that plaintiffs' attorney be qualified, experienced and adequate to

conduct the proposed litigation; (b) that there be little likelihood that the litigants are involved in a collusive suit or that plaintiffs have interests which are antagonistic to those of the remainder of the class; (c) that plaintiffs' interests be co-extensive with those of the remainder of the class; and (d) that the plaintiffs will protect the due process rights of absent class members who will be bound by any judgment.

Plaintiffs' attorneys are counsel associated with the New York Civil Liberties Union and with the Suburban Action Institute. They have extensive experience in litigating cases involving racial discrimination, equal protection and fair housing. There is no likelihood that plaintiffs are involved in a collusive suit or that plaintiffs would be in a position which is in direct or obvious conflict with that of other persons who are deprived of the opportunity to live in the proposed Wyandanch housing complex. Plaintiffs' interests are clearly co-extensive with others in the class and by asserting their own interest they will be asserting those of other persons similarly situated.

The appellants urge that the named individual plaitiffs do not adequately represent the interests of the class because there may be some persons within the class who do not wish to have the proposed housing constructed. The simplest way of dealing with this objection is to reform the class to exclude any such persons. Indeed, the appellees, in their request for certification as a class, sought to include only those persons "who would want to live [in the housing] if it were built"

(statement of facts, supra, at 3). But as Judge Mishler undoubtedly recognized, the practical consequence of including or excluding such a limitation is nil. Persons who feel they need separate representation in opposing the appellees' action can in any event seek to intervene as defendants. The only persons who could ever be bound to their detriment by a ruling in this action would be members of the class who seek to secure the construction of the housing and feel that the appellees will not adequately presecute their claims. As this Court has recognized, the existence of some members of the class who do not desire the relief sought cannot void the legitimacy of the class designation.[11/] See Norwalk Corp. v. Norwalk Redevelopment Agency, 395 F.2d 920 (1968). In any event, appellees objections to the class can easily be ameliorated by a trivial and inconsequential redefinition of the class, and is appropriately raised by a motion for such reformation pursuant to Rule 23 (c)(1), in the Court below.

11/ See also Sullivan v. Houston Independent School District 307 F. Supp. 1328, 1337-1338 (S.D. Tex., 1969) and Snyder v. Board of Trustees of University of Illinois 286 F.Supp. 927, 937 (N.D.Ill, 1968).

B. The requirements of Rule 23(b)(2) as met by the class designated by Judge Mishler.

Federal Rule 23(b) provides that:

> "An Action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Subsection 23(b)(2) was designed to be more liberally construed than either subsections 23(b)(1) or 23(b)(3). See, Arkansas Educ. Assn. v. Board of Educ. of Portland Arkansas School District, 446 F.2d 763 (8th Cir. 1971).

Civil rights actions brought under 42 U.S.C. 1983 have traditionally been treated as 23(b)(2) class actions, as the drafters of the rule apparently intended.

> "Illustrative of (b)(2) cases are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class." Notes of Advisory Committee on Rule-1966 Amendments, 28 U.S.C.A. Rule 23 at 298.

See also, Wright and Miller, Federal Practice and Procedure: Civil Sec. 1776, as cited in McGuire v. Roebuck. 347 F. Supp. 1111, 1125 (E.D. Tex., 1972).

1. Defendants Have Acted or Refused to Act on Grounds Generally Applicable to the Class.

The "congenial" judicial attitude toward class actions in civil rights cases reflects the understanding that relief which benefits the named plaintiffs will also benefit all others subject to the policy, practice, rule or statute under attack. Bailey v. Patterson, 323 F.2d 201 (5th Cir., 1963), cert. denied, 376 U.S. 910. See also, Monk v. City of Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949), cert. denied, 341 U.S. 940.

Thus, in cases involving racial discrimination, defendants have been found to be acting on grounds generally applicable to the class in such varied situations as employment practices, Hicks v. Crown Zellerback Corp. 49 F.R.D. 184 (E.D.La., 1968); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir., 1968), relocation in an urban renewal program, Norwalk CORE v. Norwalk Redevelopment Agency, supra, and school desegregation, Brunson v. Board of Trustees of School District No. 1, 311 F.2d 107 (4th Cir., 1962), cert. denied 373 U.S. 933 (1963) (pupil assignment based on race viewed as sufficient to find a (b)(2) class). And most particularly, in Davis v. City of Toledo, 54 F.R.D. 386 (N.D. Ohio, 1970), defendant municipal entity was found to be acting on grounds generally applicable to the class when defendant's city council vetoed proposed site selections made by metropolitan housing authority for low income housing and where plaintiffs' class consisted of all individuals eligible for low income housing within the city.

Subsection (b)(2) is also applicable to controversies concerning constitutional rights generally, and especially in areas relating to equal protection. Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971) (voting rights); due process, Torres v. New York State Department of Labor, 318 F.Supp. 1313 (S.D.N.Y. 1970) (unemployment compensation terminated without a hearing); and first amendment guarantees, Livingston v. Gamire, 437 F.2d 1050 (5th Cir. 1971) (challenge of disorderly conduct ordinance). If the party opposing the class has acted in a consistent manner against the class, Russo v. Kirby, 335 F. Supp. 122 (E.D.N.Y. 1971), Battle v. Municipal Housing Authority, 53 F.R.D. 423 (S.D.N.Y. 1971), or has established a regulatory scheme or policy which affects all members of the class, Cole v. Housing Authority of City of Newport, 312 F. Supp. 694 (D., R.I. 1970), the requirement that the defendant act in a manner generally applicable to the class is satisfied.

Plaintiffs herein allege that the decision of the Babylon Town Board to veto the proposed Wyandanch housing complex discriminated against black person both in motive and impact. Plaintiffs further allege that Chapter 446 of the 1973 Laws of New York State, to the extent that it empowers Towns and Villages with arbitrary veto power over Urban Development Corporation housing projects, similarly discriminates against black persons. Thus the allegedly discriminatory action of the defendants is generally applicable to the classes of black persons who are denied the opportunity to live in the proposed Wyandanch

housing complex. Accordingly, this requirement of Fed. R. Civ. P. 23(b)(2) is satisfied.

2. Injunctive Relief or Corresponding Declaratory Relief is Appropriate with Respect to the Class as a Whole.

Plaintiffs' prayer for relief requests a declaratory judgment, that the decision of the Babylon Town Board is unlawful and that Chapter 446, 1963 Laws of New York is an unconstitutional and ineffective bar to the construction of the proposed Wyandanch housing complex. Plaintiffs additionally seek to reinforce this prayer for declaratory relief with appropriate equitable relief to the end of facilitating the construction of the Wyandanch housing complex. To this end the injunctive relief and corresponding declaratory relief sought herein is both applicable and appropriate to each of the classes of persons who are denied the opportunity to live in the proposed Wyandanch housing complex. Consequently the final prerequisite to a finding of class action status under Fed. R. Civ. P. 23(b)(2) is met.

III. THE COURT BELOW DID NOT ERR IN GRANTING CLASS ACTION STATUS UPON THE PLEADINGS AND PAPERS BEFORE IT.

The appellants assert that Judge Mishler erred in designating the class because he did not have before him an adequate factual record to justify his finding[12/]. The issues for which the appellants assert a more complete factual record was required are two: (a) whether the persons within the class as designated desire the relief sought in the suit; and (b) whether the named plaintiffs, who are plainly eligible for occupancy in the project, will necessarily be entitled to reside there immediately, or whether they may be preempted by persons enjoying a higher priority.

On the question of whether every person within the designated class desires the relief sought, the simple and pertinent point is that there is and could be no factual dispute between the parties. The appellees readily concede that there may well

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12/ Marginally, the appellants assert that a full-blown evidentiary hearing preceeded by discovery should have been held prior to the class designation. But the appellants never asked for such a hearing nor sought to initiate such discovery, and it is hard to credit their claims here as serious or appropriate in light of this failure. Moreover, such extensive proceedings are precisely what the Supreme Court and this Court have eschewed in the class designation context. See pp. 27 to 29 infra.

be some persons within the class as designated[13/] who do not desire the relief sought. As indicated in Point IIA, supra, this circumstance surely does not make the class as designated invalid. See Norwalk Core v. Norwalk Redevelopment Agency 395 F. 2d 920, 937 (1968); See also Sullivan v. Houston Independent School Dist. 307 F. Supp. 1328, 1337-1338 (S. D. Tex., 1969); Snyder v. Board of Trustees of University of Illinois 286 F. Supp. 927, 937 (N. D. Ill., 1968). But what is important here is the observation that no additional factual support was required for Judge Mishler's order, as there was no factual dispute between the parties.

On the issue of the certainty of the named plaintiffs being entitled to immediate occupancy of the proposed project, the appropriate analysis is somewhat more complex. Clearly, the named plaintiffs are eligible for the proposed housing, and are thus entitled to represent the class of persons who are likewise eligible for the housing. The only question raised by the

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13/ It should be noted, however, that in "plaintiffs' memorandum of law in support of motion for an order that suit may be maintained as a class action" and in oral argument in the Court below, plaintiffs suggested that the class might be defined as "black persons of low and moderate income who would be eligible for the Wyandanch housing complex and who would want to live there if it were built" (emphasis supplied). Presumably, if this proposed definition of the class had been accepted by the Court below, appellants would have had no cause for complaint that not all persons within the class desire the relief sought in the suit.

appellants is whether, in light of the priorities among eligible persons, it is certain that the named plaintiffs will in fact be entitled to immediate occupancy of the proposed housing or will be preempted by eligible persons with a higher priority[14/]. What the appellants are asking this Court to require of the Court below, thus, is that the preliminary motion for certification of the class be turned into an inquiry which is the equivalent of a motion to dismiss for want of standing to sue under Rule 12. Such an expansion of the certification of a class action has been eschewed by the Supreme Court, and other federal courts which

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14/ It should be noted that this question was not raised by the appellants until the very day of the class action oral argument before Judge Mishler, when they submitted an affidavit to which was appended a list of Urban Development Corporation occupancy priorities (75a).

In response to this affidavit, at the oral argument on the class action motion, counsel for plaintiffs orally represented to the Court that with regard to the first occupancy priority - "residents of Wyandanch who have been displaced by government action" - upon information and belief, only two families were at the time living on the parcel of land to be used for the proposed Wyandanch housing development. Consequently, if the Wyandanch housing complex were to be built, and governmental condemnation of the parcel of land were found to be necessary, only two families would be displaced by government action within the meaning of the Urban Development Corporation's definition of priorities (75a). Accordingly, only two families would fall into the highest category of priorities. And it is unlikely that the first two categories would exhaust the potential vacancies before plaintiff's category of priority was reached.

Judge Mishler, quite correctly, did not find that this factual dispute warranted an evidentiary hearing or a factual resolution at that stage of the litigation.

have had occasion to consider the possibilities.

In Eisen v. Carlisle & Jacquelin (Eisen III), ___ U.S. ____, 40 L.Ed. 2d 732, 748 (1974) the Supreme Court vigorously rejected the proposition that it was proper for a District Court to convert the early, tentative inquiry on class action status into a review of the substantive or procedural merits of the suit: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Mr. Justice Powell, writing for the majority, cited with approval the analysis by Judge Wisdom, in Miller v. Mackey International, 452 F. 2d 424, (5th Cir., 1971):

> "Rule 23 delineates the scope of inquiry to be exercised by a district judge in passing on a class action motion. Nothing in that Rule indicates the necessity or the propriety of an inquiry into the merits. Indeed there is absolutely no support in the history of Rule 23 or legal precedent for turning a motion under Rule 23 into a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment by allowing the district judge to evaluate the possible merit of plaintiff's claims at this stage of the proceedings." 452 Fd. at 428.

An extended inquiry into and determination of the individual plaintiffs' standing to sue is precisely the kind of inquiry eschewed by the Court in Eisen III and by Judge Wisdom in the Miller case. In this regard, the case of Mersay v. First Republic

Corporation of America 43 F.R.D. 465 (S.D.N.Y. 1968) is instructive. In the Mersay case, as in the case at bar, there was some dispute as to whether the plaintiff could prove injury or damages and therefore whether the individual plaintiff had standing to sue. And in the context of the class action motion, Judge Metzger specifically held that it was inappropriate to resolve the standing issue. Judge Metzger stated, supra at 469, that,

> "this contention [regarding plaintiffs standing to sue] goes to individual substantive disputes that should await trial. Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909, 914 (9th Cir., 1964). If Mersey were required to prove his own reliance or damages at this stage, it would follow that no class action could stand until the plaintiff proved every material element of his individual claim. Clearly, such a procedure was not envisioned under rule 23.
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> The court has considered the advisability of a preliminary hearing on the points raised by defendants which have been discussed so far. Cf. Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y., 1968). In this case such a hearing would be a fact-finding procedure that would deprive the plaintiff and the class of a right to a jury trial. It would turn rule 23 into a cumbersome procedure. I cannot conceive that the drafters of the rule intended necessarily extensive hearings to determine facts which may be ultimate to the litigation."

Appellants argument in this regard suffers from the deficiency that pervades this entire appeal. Appellants fail to appreciate the tentative and conditional nature of any class action determination. Rule 23(c)(1) of the Federal Rules of Civil Procedure provides that,

> "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

Interpreting this provision of Rule 23, Judge Gurfein in Wolfson v. Solomon 54 F.R.D. 584, 590 (S.D.N.Y., 1972), observed that "[t]he emphasis is clearly on an early determination of whether the action is properly a class action and, if so, the nature of the class". It is the nature of such a preliminary inquiry that it "deals primarily with the pleadings", Weiss v. Tenney Corp., 47 F.R.D. 283 (S.D.N.Y., 1969). Hence it has been held that findings of fact are not a requisite to District Court rulings on Rule 23 motions. Interpace Corporation v. City of Philadelphia, 438 F. 2d 401 (3rd Cir., 1971).

None of this is to suggest that appellants are relegated to a single highly summary process for an airing of their grievances. If, in the course of future proceedings in this action facts are uncovered which so warrant, the appellants may seek a modification or dissolution of the class pursuant to Rule 23(c)(1). If appellants are correct in their standing claim, they can move to dismiss in the District Court pursuant to Rule 12. In such an event they will receive a full review on appeal of these matters if they seek the review of this Court after a final

determination below. In the meantime, the appellants are seeking to convert the class action determination into a Rule 12 motion to dismiss which speaks to precisely the sort of ultimate issue and involves precisely the sort of extended inquiry which has been held to be inappropriate at the preliminary interval of class action designation.

IV. THE APPELLANTS' ANOMALOUS CLAIM THAT THE CONTESTED CLASS ACTION DESIGNATION IS ERRONEOUS BECAUSE IT IS INCONSEQUENTIAL IS UNFOUNDED IN BOTH LAW AND FACT. JUDGE MISHLER'S ORDER CREATED AN ENTIRELY PROPER AND DESIRABLE MEANS FOR THE VINDICATION OF THE RIGHTS OF THE PLAINTIFFS AND THE CLASS OF PERSONS WHOM THEY REPRESENT.

Appellants conclude their argument with the anomalous claim that a fatal vice in the designation of the class action by Judge Mishler below is that class action status serves no useful purpose for the plaintiffs.

At the outset, it should be noted that the claim that it is reversible error to confer class action status where it has no formal bearing on the outcome of the case is entirely novel and utterly unsupported by precedent. Appellants purport to rely on Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), and Vulcan Society of N.Y. v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973). But the pertinent portions of Judge Friendly's decision in these cases stand merely for the simple and unsurprising conclusions that when a District Judge fails to rule on the class action question (as in Vulcan) or rules adversely to the designation of a class (as in Galvan), it is clearly not error if the designation or non-designation

of the class was of no practical consequence. This is entirely different than the anomalous proposition that where a District Judge has exercised his very broad discretion under Rule 23[15] and has designated a class, it is reversible error if the class designation is without consequence.

In the instant case, the point is academic. There are at least two respects in which the designation of the class here is of considerable potential consequence. First, in civil rights actions in the housing area as well as other areas it not infrequently develops that relief considerably more complex and variegated than mere prohibitory or declaratory relief becomes appropriate, either by way of court order or a settlement among the parties. In such a situation the existence of effective representation of the entire interests of the class actually affected by the order is crucial if the interests of justice are to be served.

Second, it is conceivable, although not likely, that the three individual plaintiffs in this cause could, by dint of relocation, good economic fortune, death or

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[15] See City of New York v. International Pipe & Ceramic Corp., 410 F.2d 295, 300 (2d Cir. 1969), and Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968).

other circumstances, suffer a mooting of their claims. In no way would such isolated events diminish the vitality of the actual controversy involved in this case. In such an event the existence of a class could well be decisive of the appropriateness of continued adjudication. Compare the Supreme Court's decision in Dunn v. Blumstein, 405 U.S. 330 (1972) where affirmative reference is made to the continuing needs of the members of plaintiff's class, with DeFunis v. Odegaard, ___U.S.___, 40 L.Ed.2d 164 (1974), where considerable stress is placed on the fact that the suit was not brought on behalf of a class with continuing needs for judicial redress.

The appropriateness of these kinds of concerns in having a suit proceed as a class action is indicated in Vulcan Society of N.Y. v. Civil Service Commission, supra. There, on some actual issues in the litigation, the trial judge's refusal to rule on the class action question created what Judge Friendly termed a "procedural impasse" on appeal, necessitating a remand. See 490 F.2d at 399-400. In the case at bar, the absence of a class action designation could well have a material bearing on the outcome of the litigation.

To soften the anomaly embodied in their contention that what is fatal to the class action designation here is its very inconsequence, the Appellants urge on this Court

two burdens which purportedly flow from Judge Mishler's class action designation. First, they assert that the class action designation can, as it has in the instant case, become the source of troubling delay and the unnecessary expenditure of judicial energy. There is a perverse irony involved in such a claim, for it is the actions of the appellants in prosecuting this appeal -- in the face of clear law in this circuit indicating that the order below is not appealable -- which has created the delay and required the expenditure of judicial energy about which the appellants now complain.

The appellants' second articulated concern in contesting the class designation is entirely cosmetic. The appellants do not wish to be placed in the position of defending against the claim that they have denied a broad class of the citizens of their community -- their constituents -- rights enshrined by the Constitution. But surely such a desire by municipal defendants is no basis for declining to designate a class. If the appellants ultimately prevail in this action, their fidelity to the rights of their constituents will be vindicated fully. If the appellees prevail it will be because the appellants have in fact deprived a large group of their constituents of

their constitutional rights. The class action mechanism is an entirely appropriate means of seeking a vindication of these rights.

CONCLUSION

For the foregoing reasons, the instant appeal should be dismissed for want of jurisdiction or in the alternative the order of the court below should be affirmed.

Respectfully submitted,

LAWRENCE G. SAGER
ARTHUR EISENBERG
RICHARD BELLMAN
Attorneys for Plaintiffs-Appellees
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

MARY JAMES, et al.,

Plaintiffs-Appellees,

-against-

AARON BARNETT, et al.,

Defendants-Appellants,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendant.

AFFIDAVIT OF SERVICE BY MAIL

- x

State of New York)
: ss.:
County of New York)

Hester Lox, being duly sworn, deposes and says: I am not a party to this action, am over 18 years of age and reside at 12 Charles Street, New York, New York 10014. On the 8th day of January, 1975, I served three (3) copies of the within Brief for Plaintiffs-Appellees upon Pratt, Caemmerer & Cleary, Esqs., attorneys for Defendants-Appellants in this action, at 374 Hillside Avenue, Williston Park, New York 11596, by depositing true copies thereof in postpaid, properly

addressed wrappers in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me this
8th day of January, 1975.

JOHN J. MARY, Esq.
NOTARY PUBLIC, State of New York
No. 31-2327215
Qualified in New York County
Commission Expires March 30, 1975

Notary Public